

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
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4 Lonnie Lee Banark,
5 Petitioner
6 v.
7 Adams, et al.,
8 Defendants
9

2:15-cv-02505-JAD-CWH

**Order Denying Motion for Stay and
Abeyance, Dismissing Petition without
Prejudice, and Closing Case**

[ECF Nos. 5, 8]

10 On March 28, 2016, I ordered § 2254 petitioner Lonnie Lee Banark to show cause why this
11 action should not be dismissed without prejudice for lack of exhaustion.¹ I also noted that online
12 court records revealed that Banark currently has a post-conviction petition pending in the Nevada
13 Supreme Court.² On April 20, 2016, Banark filed a motion for stay and abeyance of this proceeding
14 until the Nevada Supreme Court decides his currently pending appeal.³ Because Banark has not
15 demonstrated good cause for not first exhausting his remedies in state court, I deny his motion for
16 stay and abeyance and dismiss this petition without prejudice to its refiling once he has exhausted his
17 claims in state court.

18 **Discussion**

19 A district court has discretion to stay a mixed or wholly unexhausted petition to allow a
20 petitioner time to present his or her unexhausted claims in state court if the petitioner can show good
21 cause for failing to first exhaust his state-court remedies before proceeding in federal court.⁴ The
22 good-cause requirement is normally satisfied if the stay is to protect the petitioner from losing the
23 opportunity for federal review of his claims due to the expiration of the one-year filing period under
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25 ¹ ECF No. 4.

26 ² *Id.* at 1–2.

27 ³ ECF No. 8.

28 ⁴ *Rhines v. Weber*, 544 U.S. 269, 276–77 (2005).

1 28 U.S.C. § 2244(d).

2 Banark timely appealed his conviction, and the Nevada Supreme Court affirmed on July 21,
3 2015.⁵ On August 10, 2015, Banark filed his state habeas petition.⁶ The state district court denied
4 Banark's petition, and he timely appealed to the Nevada Supreme Court.⁷ The Nevada Supreme
5 Court has not issued a final decision on that appeal. Because Banark properly filed his petition for
6 state post-conviction review *before* his conviction became final for § 2244(d) purposes, his one-year
7 federal filing period has not commenced—and will not commence—until the Nevada Supreme Court
8 renders a final decision and issues a remittitur in that case.⁸

9 Banark does not indicate why he did not first exhaust his state-court remedies before filing
10 this action. To the extent Banark views his federal petition as a protective petition to ensure
11 compliance with § 2244(d)'s limitations period, protective petitions are only necessary when there is
12 "reasonable confusion about whether a state filing would be timely."⁹ For petitioners who have no
13 reason to doubt that their claims are properly pending—unexhausted—in state court, the early filing
14 of federal petitions serves no discernible purpose.

15 Barring unforeseen circumstances, Banark will have plenty of time to file his federal petition
16 once his state-court proceedings have concluded. In the absence of any legitimate or reasonable
17 concern about the timeliness of his federal habeas action, Banark cannot demonstrate good cause for
18 not first exhausting his claims in state court. I therefore deny Banark's motion for stay and abeyance,
19 dismiss this petition without prejudice to its refiling once he has exhausted his remedies in state
20 court, and close this case.

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23 ⁵ <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=33071>.

24 ⁶ ECF No. 5 at 1.

25 ⁷ <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=37543>.

26 ⁸ See 28 U.S.C. § 2244(d)(2).

27 ⁹ *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005); see also *Rudin v. Myles*, 781 F.3d 1043, 1059 (9th
28 Cir. 2015).

Conclusion

Accordingly, **Banark's petition [ECF No. 5] is DISMISSED without prejudice, his motion for stay and abeyance [ECF No. 8] is DENIED, and I decline to issue a certificate of appealability.**

The Clerk of Court is directed to serve a copy of the petition and this order on the respondents via the Attorney General, enter judgment accordingly, and CLOSE THIS CASE.

Dated this 6th day of June, 2016.



Jennifer A. Dorsey
United States District Judge